Filed 8/19/13 Elkins v. Haire CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN ELKINS, Plaintiff and Appellant, v. JUDITH ANN HAIRE, Defendant and Respondent.	A137342 (Sonoma County Super. Ct. No. SCV-250459)

I. INTRODUCTION

A decade ago, appellant, an East Bay attorney, was hired by respondent to represent her in a real estate dispute involving land owned by respondent and her brother on Skaggs Island in Sonoma County. After the resolution of that dispute, a second dispute arose between these two parties as to the fees allegedly owed appellant pursuant to the retention agreement between him and respondent. Appellant sued in Sonoma County Superior Court to collect the fees he claimed were owed him under that agreement. After the close of appellant's case, respondent moved for judgment pursuant to Code of Civil Procedure section 631.8 (section 631.8). The court granted that motion and entered judgment for respondent. Appellant appealed but, in July 2009, this court affirmed that judgment in an unpublished opinion.

In October 2011 appellant again sued respondent in the same court, alleging three causes of action for breach of contract involving the same property. Respondent demurred to that complaint on the basis that all the causes of action were barred by the doctrines of res judicata and collateral estoppel. The trial court again agreed with respondent and entered judgment in her favor. Appellant moved the trial court for reconsideration of its ruling, a motion that was also denied. Appellant again appeals to this court, but we find no error in any of the trial court's rulings and hence affirm its judgment in favor of respondent.

II. FACTUAL AND PROCEDURAL BACKGROUND

We will start by first restating (albeit with footnotes and a few minor factual details omitted) the background of the dispute between appellant attorney and respondent, the part-owner of the Haire Ranch on Skaggs Island, as outlined by this court in its 2009 opinion:

"The property at issue here, the Haire Ranch (hereafter sometimes ranch) on Skaggs Island in Sonoma County, was acquired by respondent and her brother, James Haire (hereafter sometimes James) as a gift from their mother in 2000. In April 2001, James approached his sister and offered to buy her half-interest in the ranch for a little over $200,000. Respondent agreed and sold her interest to her brother.

"The following year, respondent discovered—apparently from a newspaper article—that, at the time of the agreement with his sister, James had been in negotiations with an organization known as Wildlands, Inc. (Wildlands) regarding a complicated agreement whereby Wildlands would purchase the property from James, resell it to the San Francisco Airport Authority, which would then convert the property into wetlands and, in consideration of that action, be allowed to expand the airport's existing runways further into San Francisco Bay.

"Respondent thereafter hired appellant—as noted, an attorney—to represent her in an effort to rescind the 2001 agreement with her brother James. Her retention agreement with appellant, executed on September 9, 2002, provided that the latter would be paid on a contingency fee basis based on the 'fair market value' of 'all land and personalty recovered for the benefit of the client . . . .' Respondent was not represented by counsel in the negotiation of this agreement with appellant. She paid appellant $5,000 at the beginning of his representation of her, that amount to be credited against any contingency fee received by appellant.

“The sister/brother dispute was resolved in October 2003 by a settlement negotiated by appellant on respondent’s behalf with James. Under that settlement, James paid his sister 50 percent of the option payments he had received from the Airport Authority and transferred to her a 45.25 percent interest in the ranch property. However, prior to the execution of this agreement, in June 2003, the San Francisco Airport Authority cancelled the option agreement.

“Less than a year later, on May 27, 2004, Wildlands itself stepped into this breach by executing a new option agreement with the Haires under which it secured a one-year option to purchase the ranch for between $9 and $12 million. The reason for this agreement, according to the record made in the court below, was that Wildlands believed that the U.S. Government might decide to ‘buy out’ a levee maintenance agreement it had regarding all of Skaggs Island—including the approximately one quarter thereof comprising the Haire Ranch—in conjunction with the anticipated conversion of the former Skaggs Island Naval Communications Center (closed in 1993) back to wetlands. If it ever exercised the option provided for in that agreement, Wildlands apparently planned to pay the Haires the purchase price, take title to the land, and then sell ‘mitigation credits’ for the ranch property. Thus, the $9 million to $12 million figure was apparently based on Wildlands’ view of what it might obtain by way of a ‘buy out’ from the federal government of the latter’s obligations under the Skaggs Island levee maintenance agreement.

“However, this opportunity did not occur, and the May 2004 option agreement between the two Haires and Wildlands expired in May 2005. After that, respondent attempted to negotiate another option agreement with Wildlands, without success. Wildlands submitted to respondent a four-page, unsigned ‘Letter of Intent’ that, while making clear that it had ‘no legal effect’ and that ‘no binding contract’ existed between the parties, stated that Wildlands might, thereafter, be willing to enter into an option agreement to purchase respondent’s interest in the Haire Ranch for $4,185,000, i.e., 46.5 percent of $9 million. However, no such option agreement was ever executed; indeed, the 2005 Letter of Intent itself was never signed by either party. From July 2005 until the trial of the case, no other offers or offers of options to purchase the property were received by respondent from Wildlands—or, apparently, from anyone else.

"In the meantime, specifically in December 2004, appellant demanded to be paid a portion of his fee under the 2002 retention agreement. That agreement provided in relevant part as follows:

"12. . . . a. The attorney shall receive 10% (TEN PERCENT) of all cash recovered from the matter for the benefit of the client, accomplished by settlement prior to the filing of litigation in a court, and further shall receive 7.5% (SEVEN AND ONE-HALF PERCENT) of the value of all land and personalty recovered for the benefit of the client, accomplished by settlement prior to the filing of litigation in a court; . . . .

"15. That for purposes of paragraph 12, the phrase 'value of all land and personalty' shall be defined to mean that reasonable and fair market value which is the highest determinable at time of payment of the fee due the attorney under paragraph 12. The fair market value shall be determined either by qualified appraisal, the averaging of any disputed qualified appraisals, or actual bona fide offers to purchase any such land or personalty, which offers are current and pending at the time of payment, whatever method shall render the highest land value; provided that any bona fide offer to purchase said land by the San Francisco Airport Authority must be active and available to the client at the time of payment of the fee and cannot be contingent upon the occurrence of further events beyond the control of the client.'

"Appellant's December 2004 demand was based on the 2004 option agreement with Wildlands, claiming that it had effectively set the value of the Haire Ranch at between $9 million and $12 million. Respondent refused to pay this amount, arguing that those sums were simply a 'strike price' and did not represent either a bona fide offer to purchase the ranch or an appraisal of the ranch's real value. Sometime thereafter—

neither the complaint nor the date it was filed is included in the record provided us—appellant filed suit against respondent.[1]

"On July 10, 2007, the parties entered into a partial settlement agreement under which they agreed that the only issues to be tried to the court were (1) the amount of the fee to which appellant was entitled as of June 2005 and (2) whether he was entitled to receive 10 percent of the lease payments respondent was receiving under the 25-year lease of the property she and her brother had effected.[2]

"The parties waived a jury and the case was tried to the court (the Honorable Gary Nadler) in early October 2007. Appellant called four witnesses . . . . Also at trial, the parties stipulated that respondent had paid appellant a total of $59,500 under their agreement; that sum included the $5,000 retention payment noted above and $23,500 paid in connection with the settlement between appellant her brother, James.

"On October 5, 2007, at the close of appellant's case, respondent brought her motion under section 631.8, arguing that appellant had failed to establish the fair market value of the ranch and, consequently, was unable to prove damages. The trial court agreed with respondent's position and granted the motion; in the process, it made some specific findings also to be detailed below. A formal judgment was entered in favor of respondent on October 31, 2007."

As noted above, appellant appealed this judgment to this court, arguing that there was a lack of substantial evidence to support the trial court's ruling. We disagreed and, via our decision of July 16, 2009, we affirmed the lower court. To summarize briefly, we first held that the standard of review of a trial court's decision granting a motion to dismiss a civil case at the close of the plaintiff's case under section 631.8 is whether or not the plaintiff has sustained its burden of proof, citing *People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012, and *San Diego*

---

[1] In the record provided us on this appeal, however, appellant's first complaint is included; it is dated January 27, 2006.

[2] This second issue was resolved in appellant's favor at the 2007 trial and was not before us in the prior appeal, nor of course is it here.

Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal.App.4th 517, 528. We then went on to hold that appellant had not done so.

More specifically, we agreed with the trial court that—notwithstanding his calling of a professional real estate appraiser and the CEO of Wildlands as witnesses in the trial court—appellant had failed to adduce any evidence regarding the fair market value of respondent Haire's interest in the Haire Ranch at the critical point in time, i.e., 2004 or 2005. More specifically, we noted that (1) because of the specific language in the key paragraph 15 of the retention agreement, appellant had to produce evidence of a "qualified appraisal" of the ranch and/or respondent's interest therein, (2) neither of his witnesses, including a professional real estate appraiser, Dan Tosh, and the CEO of Wildlands, testified or produced any evidence regarding the "fair market value" of the Haire Ranch. Indeed, Tosh agreed that all he had done to offer the opinion that the ranch had a value of $9 million was to note that such a figure had been used in the unexecuted letter of intent, but he had never visited, or tried to visit, the ranch, talk to either of its owners or anyone from Wildlands, or really analyzed the alleged comparable sales of land he found in county records.

Specifically regarding Tosh's testimony, we stated: "Clearly, the trial court was correct in determining that Tosh had not truly valued the Haire Ranch at its highest and best use value, or otherwise performed a realistic appraisal of the property but, as he conceded several times, was asked only to come up with various bases upon which to justify a conclusion that the $9 million figure in the 2005 Letter of Intent was, as of then, a 'fair market value' for that property. In short, Tosh's testimony supports and does not detract from the trial court's conclusion that, in his case in chief, appellant had not presented substantial evidence that the 'fair market value' of the ranch was $9 million as of 2005."

We thus concluded: "The premise of [the trial court's] ruling was that appellant produced *no* credible expert testimony establishing the 'fair market value' of respondent's interest in the Haire Ranch at the critical point in time (2004 or 2005). . . . [¶] For all of these reasons, we agree with the trial court that appellant failed to produce substantial evidence of the fair market value of respondent's interest in the Haire Ranch as of 2004 or 2005 and, thus, that respondent's section 631.8 motion was properly granted."

As noted above, in October 2011[3] appellant filed a new action against Haire; his complaint contained three causes of action, the first two alleging breach by respondent of the 2002 fee agreement between the parties—the same agreement he sued on in 2007—and the third alleging that she had breached the 2007 partial settlement agreement.

Respondent Haire filed a demurrer to the complaint and a request for judicial notice in support thereof, a request attaching substantial material from the previous litigation. She argued that appellant's first two causes of action in his new complaint were barred by the doctrine of res judicata, and the third by collateral estoppel. After oral argument, the trial court (the Honorable Elliot Daum) sustained respondent's demurrer without leave to amend. After summarizing the law regarding res judicata, the trial court stated:

"Here, Plaintiff Elkins brought the exact same breach of contract cause of action against Defendant Haire in a case that was tried before Judge Gary Nadler in 2007. Plaintiff Elkins subsequently filed a motion for new trial and to vacate judgment, in which both motions were denied. Plaintiff Elkins then appealed the judgment; the appellate court upheld Judge Nadler's Statement of Decision and Judgment. Accordingly, Plaintiff Elkins' first and second causes of action for beach of contract must fail. [¶] Additionally, the Second Cause of Action insofar as Plaintiff contends subsequent breach based on the failure to pay lease payments to Plaintiff after the 2007 trial, the very agreement that forms the basis of Plaintiff's third Cause of Action states plainly that Plaintiff waives any future right to such payments as the issue is to be tried in the 2007 action."

[3] This date is misstated in respondent's brief to us as being in October 2010. That brief also misstates the date of the earlier judgment; it was in October 2007, not October 2009.

The court also ruled that appellant's third cause of action was barred by the doctrine of collateral estoppel.

Appellant then filed a motion for reconsideration which respondent opposed on the ground that no new facts or law were asserted therein. The trial court denied that motion and, on October 17, 2012, entered judgment in favor of respondent.

Appellant filed a timely notice of appeal on November 26, 2012. (CT 260.)

III. DISCUSSION

The key issue before the trial court was whether appellant's 2011 action is barred by that court's 2007 judgment (a judgment later affirmed by this court, and hence a final judgment) under the doctrine of res judicata. The trial court held that it was; we agree.

First of all, our Supreme Court has summarized the applicable law several times. In *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 (*Mycogen*), it stated: " 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.] Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action. [¶] A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' [Citation.] A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*.' [Citation.]" (Fn. omitted.)

And in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*), the court quoted from a previous decision, stating: " 'As generally understood, "[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." [Citation.] The doctrine "has a double aspect." [Citation.] "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" [Citation.] "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment . . . 'operates' " in "a second suit . . . based on a different cause of action . . . 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" [Citation.] "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]" ' [Citation.]"[4]

As the trial court found, appellant's complaint against Haire in the case before us, i.e., the complaint he filed in October 2011, is an attempt to litigate the same issues decided by the superior court in 2007 and affirmed by this court in 2009, i.e., whether Haire owed appellant any monies pursuant to the terms of the 2002 retention agreement. Thus, as we specifically noted in our 2009 opinion, respondent Haire's "retention agreement with appellant [was] executed on September 9, 2002, [and] provided that the latter would be paid on a contingency fee basis based on the 'fair market value' of 'all land and personalty recovered for the benefit of the client . . . .'"

We then went on to note that: (1) "in December 2004, appellant demanded to be paid a portion of his fee under the 2002 retention agreement," specifically paragraphs 12 and 15 thereof; (2) sometime thereafter (the exact date could not be established from the record then before us), appellant filed suit against respondent; (3) the only issue to be

---

[4] See also regarding the breadth and scope of the doctrine of res judicata, Code of Civil Procedure sections 1908, 1908.5, 1910, 1911 and 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, §§ 334-335, pp. 938-940.

tried by the superior court was the amount of the fee, if any, to which appellant was entitled under the 2002 agreement; (4) that issue was tried to the superior court in October 2007, and (5) "at the close of appellant's case, respondent brought her motion under section 631.8 arguing that appellant had failed to establish the fair market value of the ranch and, consequently, was unable to prove damages"; (6) a position with which the trial court agreed via "some specific findings"; and (7) thus entered judgment in favor of respondent.

In its 2007 findings, the trial court first noted that the 2002 retention agreement was drafted by appellant, an attorney, and that respondent was not represented by counsel at that time. It then continued by noting that paragraph 15 of that agreement (a key provision in this continuing controversy) defined the term "value of all land" as meaning "that reasonable and fair market value which is the highest determinable . . . ." The court continued: "The contract further addresses the term fair market value . . . and bases its determination on a qualified appraisal if there are disputed qualified appraisals by averaging them or by bona fide offer to purchase. The Court finds no evidence of the bona fide offer to purchase that has been presented."

The court then turned to the weight, if any, to be given to the testimony of appellant's purported real property valuation expert, Dan Tosh, a subject discussed above. It concluded, as did this court in its 2009 decision, that Tosh "made no effort whatsoever to contact any of the sellers or purchasers of the comparable properties that he evaluated for the purposes of arriving at a value for the Haire Ranch" and "indicated that in his opinion it was not necessary to do so," a contention the trial court labeled as "implausible." As a result, the trial court concluded, Tosh's "testimony as to the value [of the property] is not supported by the evidence."

The court concluded by holding that the unsigned "Letter of Intent" drafted in 2005 did not provide any "reasonable indication whatsoever of the value of the Haire property," a conclusion that, it then noted, the CEO of Wildlands had agreed with in his testimony. (Ibid.) As a result of these facts—and several others cited in its opinion—the trial court concluded that appellant had failed to establish any breach of contract.

We specifically affirmed this basis of the trial court's ruling in our 2009 decision, where we held that, first of all, appellant improperly urged this court to reweigh the evidence presented to the trial court and, secondly, that the testimonies of neither Wildland's CEO Morgan nor alleged real property expert Tosh provided any reliable or credible evidence whatsoever regarding the fair market value of the Haire Ranch or any portion thereof. Indeed, we specifically held that Morgan's testimony made quite clear that the unexecuted 2005 letter of intent "had nothing to do with the intrinsic value of the property itself." Regarding the testimony of Tosh, we concluded that it "supports and does not detract from the trial court's conclusion that . . . appellant had not presented substantial evidence that the 'fair market value' of the ranch was $9 million as of 2005."

Nonetheless, and despite this history, the first two causes of action of appellant's October 2011 complaint are specifically based, once again, on the September 9, 2002, retention agreement between the two parties.[5] Indeed, a copy of that agreement is attached as an exhibit to appellant's latest complaint.

In his argument to the trial court and in his briefs to us, appellant contends that this action is somehow basically different from the earlier action, i.e., that it involved different breaches of the 2002 retention agreement. Thus, in his opening brief to us, appellant asserts—as he also did in the trial court—that this action, i.e., the complaint he filed in October 2011, is based on a "different obligation of the contract, arising on a different date." Such is not barred, he asserts, because it is a "subsequent cause of action alleging a different date of breach under a different provision of the Contract . . . ." The "different date of breach" was, per appellant, October 3, 2007, a date during which the first action was being tried in the superior court. But, two days later, i.e., on October 5, 2007, when the court granted respondent's section 631.8 motion, it specifically stated:

"The issues before the Court were limited by agreement to plaintiff's [i.e., appellant's] entitlement to legal fees under his contract with the defendant, which is

---

[5] Appellant's third cause of action, also for breach of contract, is based on the "essential terms" of a July 10, 2007, "Partial Settlement Agreement."

Exhibit 7. Under that contract plaintiff was to receive 7.5 percent of the value of all land and personalty received for the benefit of the client. Plaintiff drafted the contract, he was the attorney for the defendant as a result of that contract [and] defendant was not otherwise represented by counsel." After outlining the deficiencies in appellant's evidence at the trial, i.e., the testimony of Tosh and Morgan, and the absence therein or any place else of proof of the value of the Haire Ranch, the court concluded by saying: "There are no damages, and damages are an element for breach of contract."

These statements by the trial court, provided by it in explaining its grant of respondent's section 631.8 motion, make crystal clear that the trial court was, on October 5, 2007, determining what, if any, monies were due appellant under the 2002 retention agreement (i.e., Exhibit 7 in the trial court). Its answer was, clearly: none.
Thus, what appellant was (and is) clearly attempting to do is argue that his October 2011 complaint somehow involved a new and different "breach of contract" than that alleged in his January 2006 complaint.

For a variety of reasons, such an argument simply doesn't work. In the first place, the first two causes of action in appellant's 2011 complaint are specifically based upon an alleged "Breach of Contract," and both specifically cite, as the contract breached, the document attached as Exhibit A to the complaint, i.e., the 2002 retention agreement.

Second, both of those causes of action cite to specific terms and provisions of that agreement which appellant alleges were breached, i.e., paragraphs 12 and 15. His first cause of action alleges that paragraph 15 of that contract was breached because respondent "has continued to refuse to pay" appellant "7.5% of the value of the Haire Ranch as proceeds of a settlement obtained by defendant by plaintiff as her attorney on October 3, 2003."

His second cause of action again refers to Exhibit A attached to the complaint (although for some mysterious reason alleging that it was "made" between appellant and respondent on "January 1, 2011"), and then alleges that respondent had failed to pay appellant "10% of the annual lease payments she received as proceeds of settlement as required under paragraph 12 of the contract."

In short, the first two causes of action of the October 2011 complaint clearly are based upon two alleged breaches of the September 2002 retention agreement between the parties, the agreement which was also the basis for appellant's prior action, i.e., the action in which judgment was entered against him in 2007. Indeed, in his briefs to us appellant clearly acknowledges that the September 2002 retention agreement is, once again, the foundation of his complaint in this action, i.e., the action he filed in October 2011. Thus, in two paragraphs of his opening brief, appellant not only concedes but affirmatively alleges that both his 2006 action and the first two causes of action of his 2011 action are both based on the provisions of paragraphs 12 and 15 of the 2002 retention agreement. Thus, he states:

"Under paragraph 15 of the Contract, Appellant has the right after one year from settlement to 'elect' a payment of all or a portion of his fee based on 'fair market value' of land received in settlement, after providing to Respondent a minimum of six months written notice of his election. It was on this provision of the Contract that the previous 2006 Complaint and judgment were based, alleging a breach of the election provision on June 29, 2005.

"Paragraph 15 also provides: 'At the expiration of four years from the date of accrual of any fee based on the value of recovered land or personalty, the fee shall be deemed due and shall be paid by the client whether previously elected by the attorney to be paid or not.' The First Cause of Action of the 2011 complaint is based on this provision of the Contract, alleging a breach of this provision on October 3, 2007."[6]

Regarding the second cause of action in appellant's 2011 complaint, in his opening brief on this appeal, appellant also concedes that it also is based on the same

---

[6] As explained by appellant on the following page of his opening brief, "pursuant to Paragraph 15 of the Contract . . . four years after the date of settlement, which occurred on October 3, 2003, the 7.5% contingency fee automatically became due based on the value of the Haire Ranch at that time, October 3, 2007." And, rather interestingly, such occurred right in the middle of the October 2007 trial of the first action based on this contract.

provisions, i.e., paragraphs 12 and 15 of the 2002 retention agreement, Thus, he states in his opening brief:

"The Second Cause of Action alleged, pursuant to paragraph 12a of the [2002 retention agreement] and the prior court judgment of 2007, that 10% of the lease payments from the settlement, $12,500 annually paid to Respondent by Jim Haire, fell due and were not paid on each year, beginning in 2006 to the present. Appellant alleged damages of $7,500 as of the date of filing the Complaint."[7]

Appellant attempts to avoid the consequences of the (admitted) fact that both the first two causes of action of his 2011 complaint and his prior complaint were based on alleged breaches of the 2002 retention agreement by asserting, e.g., that "the present case involves a new and different cause of action, based on a different date of breach of a different provision of the contract, than that involved in the first case."

There are several reasons why this argument fails. First of all, nowhere in his briefs to us does appellant rely on any provisions of the 2002 retention agreement to support his first two causes of action except paragraphs 12a and 15, exactly the same provisions that were at issue in the 2007 litigation, and exactly—and only—the provisions of that contract cited in this court's 2009 affirmation of the trial court's 2007 judgment in favor of respondent. Thus, appellant is flatly wrong in claiming that his 2011 complaint involved a "different provision" of the key contract. Rather it is, as the *Boeken* court described it, " ' "subsequent litigation involving the same controversy." ' " (*Boeken, supra,* 48 Cal.4th at p. 797.) And the two lawsuits did indeed involve the same controversy. As the trial court noted in its 2007 verbal statement of decision: "The issues before the Court were limited by agreement to plaintiff's entitlement to legal fees under his contract [i.e., the 2002 retention agreement] with the defendant . . . ." This statement by the trial court is clearly confirmed by the Partial Settlement Agreement entered into by

[7] In many other places in his briefs to us in this second appeal, appellant repeatedly confirms that the 2011 action (especially its first two causes of action) is based on alleged breaches by respondent of, specifically, paragraphs 12a and 15 of the 2002 retention agreement.

the parties several months before the first trial, specifically paragraph 3(f) thereof, which expressly states: "Elkins has no other or future claims against Haire for any damages or fee claimed to be due, arising out of the employment contract at issue in the Action, other than those claimed in the first cause of action." And it was that specific cause of action which was tried before the court in October 2007, a trial resulting in a judgment in favor of respondent.

Second, any and all payments possibly due from respondent to appellant under the key paragraphs of the 2002 retention agreement were based on, and only on, the "value of all land and personalty recovered for the benefit of the client" (paragraph 12a) which is later defined to mean "the reasonable and fair market value" of that property, to be determined by whichever of several possible methods "shall render the highest land value" (paragraph 15). But, as noted in the trial court's 2007 decision, affirmed by us in 2009, in the 2007 trial appellant failed to produce any credible evidence regarding the "fair market value" of the Haire Ranch or any portion of it. It would totally undermine the core philosophy of res judicata to allow appellant to sue respondent under the same provisions of the same contract (albeit on allegedly different provisions or clauses thereof) when any cause of action he could allege under any clause or provision of paragraphs 12a and 15 must be premised on the "fair market value" of the Haire Ranch, a very specific factual issue which he failed to establish at the 2007 trial.

As our Supreme Court specifically noted in *Mycogen* regarding the application of the rule of res judicata: "Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' " (*Mycogen, supra,* 28 Cal.4th at p. 897, citing *Weikel v. TCW Realty Fund II Holding Co*. (1997) 55 Cal.App.4th 1234, 1245; see also *Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037, 1043 and *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 285; see, generally, 7 Witkin, Cal. Procedure, *supra*, §§ 407-409, pp. 1042-1050.)

Since the *Mycogen* decision, several more recent cases have effectively applied the same principle. Thus, in *Mark v. Spencer* (2008) 166 Cal.App.4th 219, an attorney sued another attorney with whom he had worked in a prior class action litigation, claiming the attorney fees awarded them had been improperly allocated per a fee splitting agreement between them. Our colleagues in the Fourth District disagreed for two reasons, the first being the application of the doctrine of res judicata; they held: "First, ' "[t]he doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, *or had an opportunity* to litigate the same matter in a former action in a court of competent jurisdiction . . . ." ' [Citation.] As one court noted in the attorney fee context, 'the law is clear that *actual litigation* is not necessary as long as there has been "a fair opportunity" to litigate the claim.' [Citation.] Although the fee-splitting agreement was not considered by the [court hearing the class action], Mark has alleged no facts demonstrating that he lacked 'a fair opportunity' to bring the fee-splitting agreement to the court's attention when it considered the attorney fee requests." (*Id.* at p. 229; see also *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 575-593.) All of this authority makes clear that "[r]es judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that *could have been litigated in that proceeding*." (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82 (*Zevnik*); italics supplied; see also *Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 975.)

We also agree with the trial court regarding appellant's third cause of action, albeit for a somewhat different reason: we conclude it was also barred by res judicata.

That cause of action alleged breach of another written agreement, i.e., the "Partial Settlement Agreement" of July 10, 2007, and that such a breach occurred during the October 2007 trial on appellant's first complaint when respondent "exceeded the scope of the limitation of issues, as contained in the Partial Settlement Agreement, to be raised at [that] prior trial, that of a determination of the amount of [the] fee owed to" [appellant] by raising "[o]ther issues . . . at trial" and not maintaining "the terms of the agreement in confidence . . . ." Because of these alleged breaches, appellant contended he was damaged in the amount of $285,000, and also sought declaratory relief that the Partial Settlement Agreement was now void.

Before the hearing on respondent's demurrer, the court had before it, and presumably considered, respondent's Request for Judicial Notice and its various attachments, which included the Partial Settlement Agreement, the court's prior statement of decision, and several other relevant pleadings from appellant's lawsuit on the 2002 retention agreement. These attachments outlined the issues which were actually tried and thus subsumed in the trial court's October 2007 judgment.

As noted above, the 2007 Partial Settlement Agreement was entered into several months before the 2007 trial and specified that the issue to be tried was the money owed appellant as of 2005 under the 2002 retention agreement. Thus, the October 2007 judgment was " ' "a former judgment in subsequent litigation involving the same controversy." ' " (*Boeken, supra,* 48 Cal.4th at p. 797, italics omitted.) It thus bars relitigation of an issue that was necessarily inherent in that controversy, i.e., whether respondent owed appellant any money as of June 2005.[8] Further, if, during the 2007 trial, respondent breached the Partial Settlement Agreement, the result of that breach was necessarily subsumed in the 2007 judgment. Appellant's proper remedy was to appeal on that specific basis in 2007, and not to file another lawsuit against respondent four years later.

There were two additional failures regarding appellant's third cause of action, both of them noted by the trial court. First, when a complaint alleges breach of a written contract, "the terms must be set out verbatim in the body of the complaint or a copy of the written instrument must be attached and incorporated by reference," as stated by the appellate court in *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 459, and as also effectively mandated by Code of Civil Procedure section 430.10,

---

[8] As noted above, the controversy was then brewing: appellant initiated his demand for monies owing under the 2002 agreement in December 2004.

subdivision (g). (See also *Holcomb v. Wells Fargo Bank N.A.* (2007) 155 Cal.App.4th 490, 501.) Neither was done here.

Appellant's third cause of action did not allege either (a) how or in what respect the Partial Settlement Agreement of July 2007 was breached by respondent during the trial a few months later, or (b) how any disclosure of its terms damaged him. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.)

Finally, we also agree that the trial court was correct in denying appellant's motion for reconsideration. First of all on that point, respondent's counsel incorrectly argues to us that an order denying a motion for reconsideration is not appealable, citing *Liang v. San Francisco Rent Stabilization & Arbitration Bd.* (2004) 124 Cal.App.4th 775, 777. But this is no longer the law due to a 2011 amendment to Code of Civil Procedure section 1008, an amendment which added subdivision (g) to that statute, effective January 1, 2012, well before this appeal was filed. (See *Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576-1577 and Eisenberg et al., Civil Appeals & Writs (The Rutter Group 2011) ¶ 2:258, p. 2-123.) That new provision allows such an appeal, provided it is coupled with an appeal from the underlying judgment or order, which this appeal is.

However, we will also affirm the denial of this motion of appellant. Although, in his motion for reconsideration, appellant attached a proposed amended complaint, the trial court found that, in it, he "has not stated any 'new' facts or circumstances" and, accordingly, denied appellant's motion for reconsideration. We have reviewed appellant's proposed amended complaint and again agree with the trial court. It is clearly based on the same provisions of the same contract; indeed, in the core allegations of the proposed amended complaint, paragraph 15 of the 2002 retention agreement is cited no fewer than five times.

In short on this issue, appellant should not be permitted to assert in three successive complaints his right to recover monies from respondent under the commitments made in paragraphs 12a and 15 of the 2002 retention agreement between those parties. As the *Zevnik* court noted, all of the theories and alleged bases of recovery from respondent regarding the 2002 retention agreement “could have been litigated” in the 2007 trial. (*Zevnik*, *supra*,159 Cal.App.4th at p. 82.) Appellant should not and cannot be permitted to relitigate them multiple times.

IV. DISPOSITION

The judgment of the trial court is affirmed.

Haerle, Acting P.J.

We concur:

Richman, J.

Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.